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No. 85-2156

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

SHAARE TEFILA CONGREGATION, *et al.*,
Petitioners,

v.

JOHN WILLIAM COBB, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

MOTION FOR LEAVE TO FILE AND BRIEF OF THE ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH, THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., THE INTERNATIONAL NETWORK OF CHILDREN OF JEWISH HOLOCAUST SURVIVORS, AND THE AMERICAN GATHERING AND FEDERATION OF JEWISH HOLOCAUST SURVIVORS AS AMICI CURIAE SUPPORTING THE PETITION FOR WRIT OF CERTIORARI

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The Anti-Defamation League of B'nai B'rith, the NAACP Legal Defense and Educational Fund, Inc., the International Network of Children of Jewish Holocaust Survivors, and the American Gathering and Federation of Jewish Holocaust Survivors, pursuant to Rule 36.1, hereby move for leave to file the attached brief *amici curiae* supporting the petition for writ of certiorari. Consent to file the brief has been obtained from all of the petitioners and from the only two respondents who entered appearances in the court of appeals; letters expressing such consent have been lodged with the Clerk of this Court. Because the *amici* have been unable to obtain consent from the remaining

respondents, most of whom could not be located, this motion is necessary.

The background and concerns of the *amici* are fully set forth in the Interest of *Amici Curiae* section of the attached brief. In sum, the Anti-Defamation League and the NAACP Legal Defense Fund have sought for several decades to promote mutual understanding among all Americans and to combat racial and religious prejudice in the United States. During that period, each organization has appeared frequently before this Court as *amicus curiae* to advance constructions of the Constitution and federal civil rights laws that would ensure appropriate federal remedies for victims of racial, religious, and other forms of discrimination. The International Network and the American Gathering are organizations of Jewish survivors of the Nazi holocaust and their children.

The *amici* believe that the decision of the court below improperly deprives Jews and other minority group members of the protections afforded by section 1 of the Civil Rights Act of 1866, 42 U.S.C. §§ 1981 & 1982, and further compounds the confusion among the lower federal courts as to the proper scope of that statute. The *amici* organizations and their members bring to the issues raised in this case perspectives and experiences that are broader than and different from those of the petitioners. Accordingly, the *amici* respectfully seek the Court's leave to file the attached brief supporting the petition for certiorari.

Respectfully submitted,

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QUESTION PRESENTED

Whether Jews and other minority group members who do not belong to distinct "non-white races" but who are the victims of racially-motivated discrimination are entitled to seek relief under section 1 of the Civil Rights Act of 1866, 42 U.S.C. §§ 1981 & 1982.

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This brief is submitted on behalf of the Anti-Defamation League of B'nai B'rith, the NAACP Legal Defense and Educational Fund, Inc., the International Network of Children of Jewish Holocaust Survivors, and the American Gathering and Federation of Jewish Holocaust Survivors in support of the petition for writ of certiorari.

INTEREST OF AMICI CURIAE

B'nai B'rith, which was founded in 1843, is the oldest civic service organization of Jews in this country. The Anti-Defamation League of B'nai B'rith was formed in 1913, partially in response to the virulent anti-Semitism surrounding the Atlanta

trial of Leo Frank, *see Frank* v. *Mangum*, 237 U.S. 309, 349-50 (1915) (Holmes & Hughes, J.J., dissenting). Throughout its history, the Anti-Defamation League has pursued the objective set forth in its charter: "to secure justice and fair treatment to all citizens alike and to put an end forever to unjust and unfair discrimination against a..d ridicule of any sect or body of citizens." The Anti-Defamation League remains vitally interested in protecting the civil rights of all persons and in assuring that every individual receives equal treatment under the law regardless of his or her race, religion, or ethnic origin. One of the Anti-Defamation League's particular goals has been to combat and to remedy acts of anti-Semitic hatred and violence.

In support of its various objectives, the Anti-Defamation League has for several decades filed *amicus curiae* briefs in this and other courts. These briefs, including several dealing with the statute at issue in this case, have, as appropriate, urged the unconstitutionality or illegality of racially-discriminatory laws and practices and the provision of appropriate federal remedies to victims of such discrimination. *See, e.g., Bob Jones University* v. *United States*, 461 U.S. 574 (1983); *McDonald* v. *Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976); *Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229 (1969); *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409 (1968); *Brown* v. *Board of Education*, 347 U.S. 483 (1954); *Shelley* v. *Kraemer*, 334 U.S. 1 (1948).

The Anti-Defamation League's interest in this case arises both from its general goals of promoting and securing tolerance and equal justice and from its history of fighting anti-Semitism. The decision of the court below, if left standing, would deprive victims of anti-Semitic conduct of an important federal civil rights remedy and add to the widespread confusion in the lower courts as to the availability of such a remedy to members of other minority or ethnic groups. Accordingly, the Anti-Defamation League appears as *amicus curiae* to urge this Court to grant the writ and reverse the decision of the court below.

The NAACP Legal Defense and Educational Fund, Inc. is a non-profit corporation established to assist black persons to secure their constitutional and civil rights. The Fund believes that Congress intended section 1 of the Civil Rights Act of 1866, 42 U.S.C. §§ 1981 & 1982, to protect any group which a defendant regards as different from and inferior to "white citizens." The bigotry and hatred that characterize anti-Semitism are indistinguishable in this regard from prejudice against blacks. The statute was enacted not to put the federal courts in the business of deciding which groups are and are not "white," but to condemn the very idea that there are legally cognizable differences between "whites" and other individuals. If, as the court of appeals below believed, an act of discrimination can be defended by proof that the victim was "really white," the federal courts will inevitably be required to determine the "race" of individuals of mixed parentage. Such government classifications may have been made by the Slave Codes and the Nuremberg Laws, but they are anathema under the first, fifth, and fourteenth amendments to the United States Constitution.

The International Network of Children of Jewish Holocaust Survivors, through affiliated groups in the United States, Canada, Israel, and Europe, represents five thousand sons and daughters of European Jews who survived the Nazi holocaust. Founded in 1981, the International Network is committed to fight against anti-Semitism and all other manifestations of racial, ethnic, and religious hatred and prejudice, and to prevent the recurrence of the holocaust in any form. The American Gathering and Federation of Jewish Holocaust Survivors, formally established in 1985, is an umbrella organization representing the interests of tens of thousands of survivors of the holocaust living in the United States. Among its principal purposes are the remembrance of the holocaust and the preservation of the culture of European Jewry.

REASONS FOR GRANTING THE WRIT

This case presents a square conflict among the circuits on a significant issue of federal statutory interpretation. The Fourth

Circuit panel below, over a vigorous dissent by Judge Wilkinson, held that section 1 of the Civil Rights Act of 1866, 42 U.S.C. §§ 1981 & 1982, only addresses acts of color-based discrimination and can never be invoked by Jewish plaintiffs because they are not members of a distinct "non-white race." Pet. App. A, at 7a. During the same week, the Third Circuit expressly rejected such a narrow construction of the statute and held that Caucasian victims of racially-motivated discrimination who are members of definable minority or ethnic groups are proper plaintiffs under the statute. *Al-Khazraji* v. *Saint Francis College*,784 F.2d 505, 516-17 (3d Cir. 1986), *petition for cert. filed*, 55 U.S.L.W. 3017 (U.S. July 2, 1986) (No. 85-2169). Starkly reflecting the extensive conflict among these and other circuit and district courts, the two recent decisions generated five separate opinions, each advancing a different legal theory. That fact alone confirms the need for Supreme Court guidance in this area.

The issue of statutory construction affected by this conflict is of considerable importance. Although relatively few incidents of discrimination of the type raised in this case may be affected by the circuits' differing views on the scope of the statute, each such incident has a devastating impact on its victims, their civil rights, and their communities. Even in the absence of a conflict among the circuits, that impact, which puts in jeopardy the fundamental values that Congress sought to protect in the statute, would be sufficiently important to warrant this Court's review for the purpose of correcting the decision below, which is inconsistent with prior decisions of this Court and with the statute's legislative history. Given the disarray among the lower federal courts on this subject, the grounds for granting review are compelling.

I. The Decision Below Conflicts With Numerous Decisions of Circuit and District Courts Regarding Whether the Civil Rights Act of 1866 Protects Various Minority and Ethnic Group Victims of Racially-Motivated Discrimination.

The decision below is one of dozens in recent years that have grappled with the question of whether various minority and

ethnic group members are protected by section 1 of the Civil Rights Act of 1866, 42 U.S.C. §§ 1981 & 1982.[1] The relevant statutory language addressed in these decisions extends to "all persons" various enumerated rights on the same terms as those rights are "enjoyed by white citizens."[2] Ten years ago, this Court held unambiguously that one need not be "non-white" to invoke the statute. *McDonald* v. *Santa Fe Trail Transportation Co.*, 427 U.S. 273, 287 (1976). Prompted however by *McDonald's* dictum that the statute deals with discrimination that is racial in character, *id.*, the lower federal courts, in the intervening years, have devised numerous and conflicting tests by which the statute's coverage is withheld from or extended to various groups that may not technically qualify as distinct "non-white races." As a consequence of this disarray, the ability of minority and ethnic group members to obtain relief under the statute often depends principally on the jurisdiction in which they file suit.

The conflict among the circuits is plain and has been acknowledged by courts and commentators alike.[3] The existence

[1]Petitioners' complaint sought relief under sections 1981 and 1982. Presumably because their section 1981 claim was dismissed on alternative grounds, including the one at issue here, petitioners have sought review only of the lower courts' disposition of their section 1982 claim. Recognizing the congruence of the statutory language, legislative history, and decided cases for purposes of resolving the question presented, this brief does not distinguish between the two sections. Sections 1981 and 1982 both originated in section 1 of the Civil Rights Act of 1866. Where, as here, the relevant language is the same in both statutes, there is "no reason to construe these sections differently." *Tillman* v. *Wheaton-Haven Recreation Ass'n*, 410 U.S. 431, 440 (1973); *accord, Runyon* v. *McCrary*, 427 U.S. 160, 171 (1976).

[2]The "enjoyed by white citizens" language is common to sections 1981 and 1982. The phrase "all persons" appears in section 1981; section 1982 speaks of "all citizens."

[3]*See Ortiz* v. *Bank of America*, 547 F. Supp. 550, 559-64 (E.D. Cal. 1982) (referring to "profound disarray," citing dozens of cases, and describing three different and widely-used judicial approaches); Note, *National Origin Discrimination Under Section 1981*, 51 Fordham L. Rev. 919, 923-28 (1983) (pointing to "inconsistent approaches" among the lower federal courts and concluding that three different tests are being used); *see also* 2 J. Cook & J. Sobieski, *Civil Rights Actions* ¶ 5.09 (1985) (reviewing the contending lines of authority).

and scope of that conflict are amply illustrated by the majority and dissenting opinions of the Fourth Circuit panel below, Pet. App. A, the majority and concurring opinions of the Third Circuit in *Al-Khazraji* v. *Saint Francis College*, 784 F.2d 505 (3d Cir. 1986), *petition for cert. filed*, 55 U.S.L.W. 3017 (U.S. July 2, 1986) (No. 85-2169), and the Tenth Circuit's decision in *Manzanares* v. *Safeway Stores, Inc.*, 593 F.2d 968 (10th Cir. 1979). As further explained below, these opinions confirm that if petitioners' lawsuit had been filed in either the Third or the Tenth Circuit, the result urged by the dissenting member of the Fourth Circuit panel would have obtained.

The panel below confronted a claim by petitioners that the desecration of their synagogue was racially motivated and thus actionable under sections 1981 and 1982. Petitioners' allegations of respondents' racial motivations were supported by uncontradicted admissions that respondents viewed Jews as racially distinct and inferior to white persons.[4] Nonetheless, a divided Fourth Circuit affirmed the district court's dismissal of the lawsuit and held that "discrimination against Jews is not racial discrimination" because Jews are not members of a "racially distinct group" that is "commonly considered to be non-white[]." Pet. App. A, at 6a-7a. In short, the panel held that Jews are not entitled to invoke sections 1981 and 1982 because they are not members of a distinct "non-white race" and hence cannot be the victims of "racial discrimination" by other whites.

Judge Wilkinson in dissent rejected the majority's view that a plaintiff must establish membership in a "non-white race." Instead, he concluded that the statute was designed to remedy the

[4]Because this case was decided on respondents' motion to dismiss, such allegations must be treated as true. Moreover, these factual allegations were substantiated by deposition testimony, affidavits, and other evidence placed in the district court record by petitioners. For purposes of the appeal in the Fourth Circuit, respondents conceded the accuracy of petitioners' "factual argument that the [respondents] perceived Jews as racially inferior." Brief for Appellees at 5, *Shaare Tefila Congregation* v. *Cobb* (4th Cir. 1986). Petitioners did not contend in their complaint that Jews constitute a separate race; instead, they focused on the racial motivations of respondents.

effects of conduct motivated by "racially discriminatory animus." Pet. App. A, at 13a; *see id.* at 12a, 14a. He would have held that petitioners were entitled to invoke the statute because they could demonstrate that the synagogue desecration was racially motivated. *Id.* at 14a-16a. Judge Wilkinson also would have allowed petitioners to proceed because there is a common *perception* among many that Jews constitute a separate race. *Id.* at 16a-17a, 20a. Judge Wilkinson relied heavily on Supreme Court precedent and the legislative history of the statute in concluding that the racial or racist character and motivation of the conduct, instead of the "non-white race" of the plaintiff, should be controlling. *Id.* at 13a-14a. In determining that racial motivation rather than racial identity should govern, he also noted the absence of a definitive, non-arbitrary concept of race by which to identify "appropriate" plaintiffs. *Id.* at 18a-19a.

At least two circuits, the Third and the Tenth, as well as many district courts, agree with Judge Wilkinson that a minority or ethnic group member need not establish his membership in a "non-white race" to invoke the statute. For example, the Third Circuit's recent opinion in *Al-Khazraji* v. *Saint Francis College*, *supra*, is squarely in conflict with the panel opinion below. In *Saint Francis College*, the plaintiff was an Arab who concededly belonged to the Caucasian race. 784 F.2d at 507, 514. The court nonetheless held that, even though he was "white," he was entitled under the Civil Rights Act to prove that he had been subjected to "racially-based prejudice." *Id.* at 517. Recognizing that race is an amorphous concept and that prejudice is often based on mistaken concepts of race, *id.*, the panel concluded, after examining the legislative history, that "race" was not used by members of the 39th Congress in a "crabbed fashion" and did not refer to narrow scientific categories of race. *Id.* at 516; *see also id.* at 520 (Adams, J., concurring). In sum, the Third Circuit departed from the Fourth Circuit's analysis both in holding that

Congress did not intend to limit the statute's protection to members of distinct "non-white races" and in emphasizing racial motivation rather than "scientific" racial identity. Under either approach, petitioners' claims undoubtedly would have survived a motion to dismiss in the Third Circuit.

Even more favorable to petitioners' position is the decision of the Tenth Circuit in *Manzanares* v. *Safeway Stores*, *supra*. There, Judge Seth ruled that the statute requires only that the plaintiff belong to an identifiable group subject to prejudice by the majority and that he allege discrimination because of his membership in that group. 593 F.2d at 970. The court criticized reliance on the plaintiff's racial identity, observed that the statutue does not even mention "race," and concluded that the statute could not be limited to racial discrimination in a technical or narrow sense. *Id*. at 970-71. The court held — without ruling that they are a racial group, that they are non-white in color, or that they are subject to racially-motivated prejudice — that "persons with Spanish surnames" form an identifiable group entitled to invoke section 1981. *Id*. at 970-72. Petitioners here obviously would have satisfied this test because of their membership in an identifiable minority group subject to discrimination.

As the discussion above indicates, the panel below employed a restrictive analysis at odds with at least two other circuits.[5] While the *Manzanares* and *Saint Francis College* cases do not specifically deal with Jewish plaintiffs,[6] the factual and legal

[5]A recent Sixth Circuit decision cited *Manzanares* with approval and allowed a section 1981 claim to proceed where it was shown that the defendant, who had used racist epithets, was racially motivated. *Erebia* v. *Chrysler Plastic Prod. Corp.*, 772 F.2d 1250, 1253-54 (6th Cir. 1985), *cert. denied*, 106 S. Ct. 1197 (1986). Although it does not precisely apply Judge Seth's rationale, the Sixth Circuit does not require proof of membership in a "non-white race." After an exhaustive review of the case law and a closely-reasoned analysis of the issue, the district court in *Ortiz* v. *Bank of America*, 547 F. Supp. 550, 564 (E.D. Cal. 1982), expressly determined to follow the *Manzanares* approach. Numerous other decisions rejecting the position taken by the panel below are cited in *Ortiz*.

[6]Other than the lower court decisions in this case, there are few reported cases that directly confront the applicability of sections 1981 and 1982 to Jewish

analyses of those opinions clearly demonstrate that petitioners' claims would not have been dismissed in a jurisdiction applying those precedents. Such a conflict among the federal courts should not be permitted to persist, particularly where the attendant uncertainty inhibits the vindication of important federal civil rights. The writ should be granted to resolve this conflict.

II. The Decision Below is Inconsistent With This Court's Holding in *McDonald* v. *Santa Fe Trail.*

The court below affirmed the dismissal of petitioners' claims because Jews are not members of a "racially distinct group" that is "commonly considered to be non-white[]." Pet. App. A, at 7a. This Court has held, however, that one need not be "non-white" to state a claim under the statute. *McDonald* v. *Santa Fe Trail Transportation Co.*, 427 U.S. 273, 287 (1976). Accordingly, the decision below cannot be squared with this Court's holding in *McDonald*.

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plaintiffs; none deals with the issue in a context where, as here, the racial animus of the defendant is conceded. In *Marlowe* v. *Fisher Body*, 4 Fair Empl. Prac. Cas. (BNA) 1160 (E.D. Mich. 1972), *later app. on other grounds*, 489 F.2d 1057 (6th Cir. 1973), the district court held that the Jewish plaintiff could invoke section 1981. The court noted that prejudice against Jews is not purely religious in character, but is racial as well. 4 Fair Empl. Prac. Cas. (BNA) at 1161. After trial, however, which proceeded on the agreed-upon theory that any discrimination was solely religious, the district court dismissed the section 1981 claim. 11 Fair Empl. Prac. Cas. (BNA) 1357, at 1361 (E.D. Mich. 1975). One district court decision in California, explicitly rejecting *Manzanares*, dismissed a Jewish plaintiff's section 1981 claim on the ground that Jews are not a race. *Wald* v. *International Brotherhood of Teamsters*, 25 Empl. Prac. Dec. (CCH) ¶ 31,497, at 18,993 (C.D. Cal. 1980). A more recent California district court decision embraced *Manzanares* and observed that discrimination against Jews is motivated by "racial prejudice" and that Jewish victims of discrimination should be allowed to invoke the statute. *Ortiz* v. *Bank of America*, 547 F. Supp. 550, 567 & n.25 (E.D. Cal. 1982). A final case barring Hasidic Jews from invoking the statute is distinguishable because the overwhelming majority of the defendants were themselves Jewish and the apparent motivation for the alleged discrimination was based on Hasidic dress and lifestyle. *Weiss* v. *Willow Tree Civic Ass'n*, 467 F. Supp. 803, 816 & n.48 (S.D.N.Y. 1979).

In *McDonald*, the Court emphasized that "the statute explicitly applies to '*all* persons' (emphasis added), including white persons." *Id.* (emphasis and parenthetical in original). The statute's qualifying phrase, "as is enjoyed by white citizens," is designed not to limit the statute's applicability to non-whites, but rather "to emphasize the racial character of the rights being protected." *Georgia* v. *Rachel*, 384 U.S. 780, 791 (1966), *quoted in McDonald*, *supra* at 287. *Rachel* and its companion case, *City of Greenwood* v. *Peacock*, 384 U.S. 808 (1966), decided under the removal provisions of the 1866 Civil Rights Act, involved state criminal prosecutions of groups of black and white civil rights workers. It was the nature of the criminal offense, not the race of the criminal defendant, that the Court considered relevant in determining the availability of the federal remedy.

The same construction — one stressing the character of the rights being protected, rather than the "race" of the plaintiff — was also advanced in *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409 (1968), where the Court pointed out that "*all* racially motivated deprivations of the rights enumerated in the statute" are protected. *Id.* at 426 (emphasis in original). Indeed, once one accepts *McDonald's* holding that whites and non-whites alike can invoke the statute, racial *status* should become largely irrelevant and racial motivation and character should become the central issues. In the present case, the complaint alleged that the attack on the synagogue was racially motivated — that it occurred because of respondents' racial views. Thus, under controlling Supreme Court precedent, a claim for relief had been stated.

The panel below disregarded the holdings of this Court and refused to consider the racial character of the conduct and rights involved. Instead, looking solely to the race of the plaintiffs, it held that, since Jews are not "non-whites," no cause of action could be stated. That holding is directly contrary to the decisions of this Court in *McDonald* and the cases upon which the *McDonald* Court relied. It also conflicts with this Court's injunction that the statute be generously applied and that " 'ingenious analytical instruments' . . . [not be employed] to carve . . .

exception[s]" from the statute.[7] For these reasons, certiorari should be granted and the decision below corrected.

III. The Question Presented was Incorrectly Resolved by the Court Below.

Although this Court held twenty years ago in *Georgia* v. *Rachel*, 384 U.S. 780, 791 (1966), that section 1 of the Civil Rights Act of 1866 protects certain rights against infringement on account of thier "racial character," it has not yet had occasion precisely to define that term. The color-based definition chosen by the Fourth Circuit, "non-white," is plainly wrong. It contradicts both the legislative history of the Act and commonly accepted notions about race and racial discrimination.

A. The Legislative History Contradicts the Unduly Narrow Statutory Interpretation Adopted by the Court of Appeals.

In determining the "racial character" of the rights Congress intended to protect under sections 1981 and 1982, one must look first to the Act's legislative history. That history makes clear that the concept of "race" as understood and used by the 39th Congress was meant to encompass a far broader range of groups than just the "non-whites" protected by the court below.

In introducing the Civil Rights Act of 1866, Senator Trumbull described it as a bill designed "to protect all persons in the United States in their civil rights" and emphasized that it applied to "every race and color." Cong. Globe, 39th Cong., 1st Sess. 211 (1866). Representative Wilson, Chairman of the House Judiciary Committee and the bill's floor manager in the House, stressed that the measure would "protect our citizens, from the highest to the lowest, from the whitest to the blackest, in the

[7] *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 437 (1968) (quoting *United States* v. *Price*, 383 U.S. 787, 801 (1966)); *see also City of Memphis* v. *Greene*, 451 U.S. 100, 120 (1981) (statute's language to be "broadly construed"); *Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229, 237 (1969) ("narrow construction of the language . . . would be quite inconsistent with the broad and sweeping nature of the protection meant to be afforded").

enjoyment of the great fundamental rights which belong to all men." *Id.* at 1118.

While there can be no doubt that the Act was intended primarily to protect the rights of blacks, it is likewise clear that Congress did *not* intend to limit "race" by a color-based definition. In overriding President Johnson's veto of the Act, Congress reaffirmed that:

> "This bill, in that broad and comprehensive philanthropy which regards all men in their civil rights as equal before the law, is not made for any class or creed, or race or color, but in the great future that awaits us will, if it become a law, *protect every citizen, including the millions of people of foreign birth who will flock to our shores* to become citizens and to find here a land of liberty and law."

Id. at 1833 (emphasis supplied). As this passage demonstrates, sections 1981 and 1982 were never intended by Congress to apply solely to non-whites, but rather, as the statute provides, to "all persons" and "all citizens."

The term "race," as used in the debates, was meant to be given a broad meaning so that it would encompass every "class or creed, or race or color." *Id.* This broad meaning is evident in Representative Shallabarger's statement that:

> "Who will say that Ohio can pass a law enacting that no man of the German race, and whom the United States has made a citizen of the United States, shall ever own any property in Ohio . . . . If Ohio may pass such a law, and exclude a German citizen . . . because he is of the German nationality or race, then . . . you have the spectacle of an American citizen admitted to all its high privileges and entitled to the protection of his Government . . . and yet that citizen is not entitled to either contract, inherit, own property, work, or live upon a single spot of the Republic, nor to breathe its air."

Id. at 1294; *see also id.* at 1757 (noting President Johnson's objection that the bill would make citizens of "Chinese and Gypsies").

In addition, the more generalized comments in the legislative history about members of different "races" must be read in light of the common understanding of that term at the time.[8] A leading contemporary dictionary defined "race" as follows: "A race is the series of descendants indefinitely. Thus all mankind are called the *race* of Adam; the Israelites are of the *race* of Abraham and Jacob." N. Webster, *An American Dictionary of the English Language* 903 (C. Goodrich rev. Springfield, Mass. 1860) (emphasis in original). In addressing the meaning of racial terminology in another context, this Court has noted:

> "It is in the popular sense of the word, therefore, that we employ it as an aid to the construction of the statute, for it would be obviously illogical to convert words of common speech used in a statute into words of scientific terminology when neither the latter nor the science for whose purposes they were coined was within the contemplation of the framers of the statute or of the people for whom it was framed. The words of the statute are to be interpreted in accordance with the understanding of the common man from whose vocabulary they were taken."

United States v. *Bhagat Singh Thind*, 261 U.S. 204, 209 (1923). Against this background, the legislative history confirms that the Fourth Circuit's "scientific" limitation of the Act to "non-white races" is ill-founded and should be reviewed and reversed by this Court.

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[8]Conceptual and definitional problems associated with race are discussed more fully in Part III.B, *infra*.

B. Federal Remedies for Racially-Discriminatory Conduct Should not be Limited by Narrow and Arbitrary Definitions of "Race."

Respondents' desecration of petitioners' synagogue was racially motivated; it was prompted by respondents' belief that Jews are members of a distinct and inferior non-white race. *See* p. 6, n. 4, *supra*. Despite the uncontradicted evidence of the racist nature of the desecration, the panel below dismissed petitioners' claims because Jews in fact do not belong to a distinct non-white race. Pet. App. A, at 7a. The panel was correct in rejecting the notion that Jews are members of a scientifically distinct "race." However, the panel was plainly wrong in concluding that *its* enlightened notions of racial identity should be applied to restrict the availability of sections 1981 and 1982. Such a narrow interpretation of the statute's coverage ignores both the true character of racism and the inappropriateness of restrictive judicial definitions of race.[9]

Judge Seth has aptly observed that racists are "poor anthropologists" and that racial "[p]rejudice . . . . is based on all the mistaken concepts of 'race.' " *Manzanares v. Safeway Stores, Inc.*, 593 F.2d 968, 971 (10th Cir. 1979); *see also* Pet. App. A, at 11a (Wilkinson, J., dissenting); S. Washburn, *The Study of Race*, in *The Concept of Race* 243, 254 (A. Montagu ed. 1964). This connection between misbegotten notions of race and racial prejudice is a commonplace. But such misbegotten notions must not be ignored if the statute is to apply to "*all* racially motivated deprivations of . . . rights," *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 426 (1968) (emphasis in original).

The panel below refused to permit petitioners to invoke the statute on the theory that respondents' "subjective, irrational perceptions" that Jews are a race should not be controlling. Pet. App. A, at 7a. This holding not only clashes with this Court's extension of the statute to "*all* racially motivated" conduct, it also

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[9]The *amici* reject the notion that Jews should be classified as members of a distinct "race," but, as is made clear throughout this brief, believe that the statute must be construed to cover acts of racism directed towards Jews.

ignores the fact that anti-Semitism has long been the product of racial misperceptions. The racist motivations of respondents are similar to the motivations that have animated anti-Semitic conduct for centuries.

A recent study of the character of anti-Semitism observed that:

> "In medieval times hostility to the Jew, whatever its underlying social or psychological motivations, was defined primarily in religious terms. From the fifteenth century onward this was no longer true, and Jew hatred was redefined, becoming at first partly, and then, at least in theory, wholly racial."

B. Lewis, *Semites and Anti-Semites* 81 (1986). The racist content of anti-Semitism, from at least the time of the Spanish Inquisition through Nazi Germany to present-day America, is a matter of historical record. *See id.* at 26-33, 81-100; T. Gossett, *Race: The History of an Idea in America* 9-12, 292-93, 371-72, 449 (1963); *see also* Pet. App. A, at 16a-17a (Wilkinson, J., dissenting); *Ortiz* v. *Bank of America*, 547 F. Supp. 550, 567 (E.D. Cal. 1982). Six million Jews did not die in the holocaust as a result of differences in religious doctrine; they were the victims of an avowedly racist Nazi ideology that measured Jewishness by blood rather than belief. The panel below was mistaken in concluding that application of the statute to Jews would require it to indulge the isolated racist idiosyncracies of the individual respondents. The history of anti-Semitism amply, if not tragically, demonstrates its pervasive racist character.

Having refused to consider the racist motivations of respondents, the panel determined that since Jews are not a separate "non-white race" or not commonly thought of as one they are not entitled to invoke the statute. The test applied was explicitly based on skin color. In adopting such a racial test, the panel ignored the fact that "race" is not necessarily such a narrow concept and that for purposes of this statute a restrictive judicial "race test" is inappropriate.

There is no definitional consensus in the scientific or academic community about "race." *See generally* A. Montagu (ed.), *The Concept of Race* (1964) (collecting various scholarly essays on topic); *see also United States* v. *Bhagat Singh Thind*, 261 U.S. 204, 212 (1923); J. Barzun, *Race: A Study in Superstition* 203-07 (1965). Indeed, to the extent that there is agreement, it is on the proposition that the purpose of any racial classification dictates its scope and content. *See Ortiz* v. *Bank of America*, 547 F. Supp. 550, 565-67 (E.D. Cal. 1982); S. Molnar, *Races, Types, and Ethnic Groups* 13 (1975). In the lay community, "race" remains an extraordinarily open-ended concept; it is defined as broadly in today's leading dictionaries as it was over 100 years ago, when the Civil Rights Act was passed.[10]

Despite the fact that Jews should not be classified as a scientifically distinct "race," it is nonetheless also true that Jews are considered by many to constitute a "race." The mistaken belief that Jews belong to a separate "race" is not only held by anti-Semites; many with benign attitudes towards Jews often refer to them as a "race."[11] Indeed , a standard dictionary in America still illustrates its definitions of "race" with unfortunate references to the "Hebrew race" and the "Jewish race." *Webster's Third New International Dictionary* 1870 (1981).

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[10]*Compare Webster's Third New International Dictionary* 1870 (1981) ("descendants of a common ancestor" or "a class or kind of individuals with common characteristics, interests, appearance, or habits") *with* N. Webster, *An American Dictionary of the English Language* 903 (C. Goodrich rev. Springfield, Mass. 1860) ("the series of descendants indefinitely").

[11]A. Montagu, *Man's Most Dangerous Myth: The Fallacy of Race* 353 (5th ed. 1974); *see, e.g., Hirabayashi* v. *United States*, 320 U.S. 81, 111 (1943) (Murphy, J., concurring) (wartime treatment of Japanese Americans "bears a melancholy resemblance to the treatment accorded to members of the Jewish race in Germany and in other parts of Europe."); *Near* v. *Minnesota*, 283 U.S. 697, 703 (1931) (Hughes, C.J.) ("Jewish Race"); I. Berlin, *Against the Current: Essays in the History of Ideas* 274-75 (1980) (describing Disraeli's theory of the "Jewish race"); Letter from Learned Hand to Charles H. Grandgent (Nov. 14, 1922), *reprinted in* L. Hand, *The Spirit of Liberty* 21 (3d ed. 1974) (urging that Harvard College not impose a "limitation based upon race" to restrict admission of Jews).

The panel below erred in dismissing out of hand the notion that Jews — because of the widespread, though mistaken, belief that they belong to a "race" — should be entitled to invoke the statute. It held in essence that victims of racial discrimination may invoke the statute only if the defendant's views on their racial identity coincide with those of society's most enlightened members. This holding ignores the contemporary and lay meanings of the term "race" and the express purpose of the statute. And such an abstract and restrictive reading of the statute would leave countless victims of discrimination plainly racist in character without any effective remedy.[12]

By refusing to consider the racial motivations of respondents or to accept the broader understanding of "race" prevalent at the time of the Act or in modern lay usage, the panel below left itself the task of devising a modern "scientific" definition of "race" and assumed the role of arbiter of racial classifications. In light of the absence of a scientific or academic consensus on either the propriety or the application of racial definitions, such a judicial role is inappropriate and will inevitably lead to arbitrary and restrictive classifications. It will likely result in unseemly inquiries into the racial background of litigants and the formulation of artificial and technical racial distinctions.[13] The breadth of the statute, however, renders such a definitional role unnecessary because of its sweeping prohibition of all racially-motivated discrimination. This Court therefore should reject the color-based test of the panel below and make it clear that a plaintiff need not "prove his

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[12]The racial animus displayed by respondents' conduct brings it within the terms of the statute in question and distinguishes it from situations involving religious discrimination in employment, housing, and public accommodations, which are in any event covered by other federal civil rights legislation specifically proscribing discrimination based on religion.

[13]*See* Note, *Legal Definition of Race*, 3 Race Rel. L. Rep. 571 (1958) (reviewing statutory definitions of racial groups and judicial interpretations thereof); *compare United States* v. *Bhagat Singh Thind*, 261 U.S. 204, 209-15 (1923) (high caste Hindu not a "free white person" for naturalization purposes) *with In re Mohan Singh*, 257 F. 209 (S.D. Cal. 1919) (reaching opposite result apparently undermined by the *Thind* case).

[racial] pedigree," *Al-Khazraji* v. *Saint Francis College*, *supra*, 784 F.2d at 517, before he is permitted to invoke a statute which by its terms protects "all persons."

CONCLUSION

For the foregoing reasons, the *amici* respectfully urge the Court to grant the writ.

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